8-1-2011

# *Padilla v. Kentucky* and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?

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**ABSTRACT**

Though widely heralded by immigration and human rights lawyers as a "landmark," possible "watershed," and even "*Gideon* decision" for immigrants, *Padilla v. Kentucky* is perhaps better understood as a Rorschach test, than as a clear constitutional precedent. It is surely a very interesting and important U.S. Supreme Court case in the (rapidly converging) fields of immigration and criminal law in which the Court struggles with the functional relationship between ostensibly "civil" deportation proceedings and criminal convictions. This is a gratifying development, for reasons not only of justice, fairness, proportionality, and basic human decency, but also (perhaps) of doctrinal consistency. The Court's choice to rely upon the Sixth Amendment is understandable and in many respects salutary. However, this choice is also in tension with the civil/criminal distinction, and it raises complex questions about the process that might be due deportees both in criminal courts and immigration proceedings.

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## INTRODUCTION

Though widely heralded by immigration and human rights lawyers as a "landmark,"[1] possible "watershed,"[2] and even a "*Gideon* decision" for immigrants,[3] *Padilla v. Kentucky*[4] is perhaps better understood as a Rorschach test than as clear constitutional precedent. The basics of the holding are as profoundly important as they are apparently straightforward: the U.S. Supreme Court has held—for the first time in history—that a deportee has a Sixth Amendment right to effective counsel when deciding whether to plead guilty to a criminal offense that would result in deportation.[5] That alone makes it one of the more interesting and important Supreme Court cases we have ever seen in the (rapidly converging) fields of immigration and criminal law. Indeed, it is one of the very few times that the Court has even begun to grapple seriously with the functional relationship between ostensibly "civil" deportation proceedings and criminal convictions.[6] This is surely a gratifying development, for reasons not only of justice, fairness, proportionality, and basic human decency, but also (perhaps) of doctrinal consistency.

Still, my reactions to the Court's inkblot of an opinion have run the gamut from surprise, to that special personal glee that comes from seeing a rare constitutional victory for the rights of deportees, to less felicitous feelings such as "better late than never," and a lingering confusion about its impact, upon which this Article will elaborate briefly.

Positive it surely was, but also rather late. For more than a decade now, many have been deeply concerned about the state of immigration law in the wake of the 1996 laws known as AEDPA[7] and IIRIRA.[8] It was apparent

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[1] *Supreme Court Issues Landmark Decision, Upholds Integrity of Criminal Justice System for Immigrants*, IMMIGRANT DEF. PROJECT, http://www.immigrantdefenseproject.org/index.htm (last updated Jan. 19, 2011).

[2] DAN KESSELBRENNER, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: RETROACTIVE APPLICABILITY OF *PADILLA V. KENTUCKY* (2010), *available at* http://nationalimmigrationproject.org/legalresources/cd_pa_ padilla_ retroactivity.pdf.

[3] *See* Maria Teresa Rojas, *A "*Gideon *Decision" for Immigrants,* OPEN SOC'Y FOUND. BLOG (Apr. 7, 2010), http://blog.soros.org/2010/04/a-gideon-for-immigrants/.

[4] 130 S. Ct. 1473 (2010).

[5] *Id.* at 1478.

[6] In *INS v. St. Cyr*, the Court stated that "deportation is not punishment for past crimes" and then imported an anti-retroactivity norm redolent of criminal law into the nominally civil deportation realm. 533 U.S. 289, 324 (2001). *See generally* Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 421 (2002).

[7] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.).

[8] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L.

that the ascendance of a rather broad-brush "crime control justification" for deportation, "together with the increasing real-world convergence between [the] criminal justice and deportation systems," and the harshness of deportation "compel[led] a rethinking of the foundational principles underlying the constitutional status of deportation."[9] In particular, it remains clear that "the constitutional norms applicable to criminal cases should inform our approach to deportation far more specifically than they have in the past."[10] But would courts actually be willing to do this? And how would it best be conceptualized? As it turns out, the answers seem to be: to a limited degree and slowly. Constitutional conceptualization is still a work in progress.

Prior to *Padilla*, many Supreme Court decisions relied upon a simple, formalistic distinction between two consequences of certain criminal convictions: the punishment meted out in criminal courts and deportation. The former was of course "criminal law," while the latter was "civil," or at most "quasi-criminal." Every once in a while, the Court, or a Justice or two, would be troubled by the implications of this model and would note the harshness of deportation as a sanction that could result "in loss of both property and life; or of all that makes life worth living."[11] But one must travel far back in time, perhaps all the way back to the 1896 case of *Wong Wing v. United States*,[12] to see the last Supreme Court case in which the inherent contradictions of that formalistic civil/criminal model resulted in the invocation of specific, substantive, constitutional protections for deportees. In that case, the Court considered an 1892 deportation statute that also authorized the imprisonment at hard labor for up to a year of any

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No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18 U.S.C.). Both AEDPA and IIRIRA were passed in the chaotic aftermath of the Oklahoma City bombing. Among other features, the 1996 laws:

- radically changed many grounds of exclusion and deportation;
- *retroactively* expanded criminal grounds of deportation;
- eliminated some and limited other discretionary waivers of deportability;
- created *mandatory* detention for many classes of noncitizens;
- expedited deportation procedures for certain types of cases;
- eliminated judicial review of certain types of deportation (removal) orders;
- vastly increased possible state and local law enforcement involvement in deportation; and
- created a new type of streamlined "removal" proceeding—permitting the use of secret evidence—for noncitizens accused of "terrorist" activity.

*See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 n.5 (2000).

[9] *Id.* at 1892.

[10] *Id.*

[11] *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[12] 163 U.S. 228, 237 (1896).

Chinese citizen judged to be in the United States illegally.[13] The statute provided that such defendants would have no right to indictment or judicial trial before an Article III judge or by jury.[14] The Court held this provision unconstitutional.[15] Detention or temporary confinement was permissible, said the Court, "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens."[16] However, when Congress pursues deportation policy by subjecting noncitizens to "infamous punishment at hard labor, or by confiscating their property," then "such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."[17]

The rigid distinction drawn by the *Wong Wing* Court between detention "as part of the means necessary," and as "infamous punishment" obscured some very complex issues.[18] For example, Wong Wing's lawyers argued that the potential punishment for the offense was *purely* criminal and thus *all* constitutional protections were required for their client.[19] Had they instead argued that the proceedings were *quasi-criminal*[20] they might have required the Court to engage in a serious due process analysis. By failing to present a middle ground option, they presented the Court with a binary constitutional problem: imprisonment at a hard labor camp was either a criminal or civil consequence, and depending on the judge's determination, particular constitutional consequences followed.[21]

The theoretical problem was that deportation had already been deemed a civil proceeding (and not punishment for constitutional purposes) by the Court in its 1892 decision in *Fong Yue Ting v. United States*.[22] Indeed, the Court had held that the power to deport was as "absolute and unqualified" as the power to exclude.[23] A mere four years later, the Court was presumably not much interested in overturning that precedent (though *Fong Yue Ting* had inspired passionate dissents). Thus, in *Wong Wing*, the Court reaffirmed the general idea that the government's

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[13] *Id.*; *See* Geary Act ch. 60, § 4, 27 Stat. 25 (1892), *repealed by* Act of Dec. 17, 1943, ch. 344.

[14] § 3, 27 Stat. at 25.

[15] *Wong Wing*, 163 U.S. at 237-38.

[16] *Id.* at 235.

[17] *Id.* at 237.

[18] DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 122 (2007).

[19] *Wong Wing*, 163 U.S. at 233-34. The government, conversely, argued that punishment at hard labor did not render the proceeding to be for an "infamous" crime. *Id.* at 234.

[20] *See* KANSTROOM, *supra* note 18, at 122; *see also* Boyd v. United States, 116 U.S. 616, 633-34 (1886) ("We are . . . clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.").

[21] *See* KANSTROOM, *supra* note 18, at 122.

[22] 149 U.S. 698, 730 (1892).

[23] *Id.* at 762.

extra-constitutional "plenary power" to *exclude* noncitizens extended to deportations *from* U.S. territory:

> No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, *or to expel such* if they have already found their way into our land and unlawfully remain therein.[24]

However, this model was potentially in contention with the decision of the *Wong Wing* Court *also* to view the constitutional civil/criminal line as applicable to deportees, notwithstanding the "plenary power" doctrine. The *Wong Wing* Court sought a consistent "theory of our government"[25] with which to distinguish the civil mechanisms of deportation from criminal punishment. The fact that Congress had wrapped a year at hard labor within the deportation system did not necessarily override certain *specific* constitutional protections. The Court, in brief, did not rely upon formalistic "plenary power" doctrine or, for that matter, upon the status of the accused as "deportable aliens" to avoid the functional dilemma presented by the 1892 law, "[b]ut to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."[26]

*Wong Wing* thus raised an important question that remains unresolved, even—unfortunately—in the wake of *Padilla v. Kentucky*: how should courts draw the line between what might be termed *regulatory* civil deportation procedures and those *punitive* deportation procedures that require constitutional protections analogous—if not identical—to those afforded criminal defendants?[27]

Until *Padilla v. Kentucky*, the Supreme Court had never seriously reconsidered the basic analytical questions of *if* and *how* this analysis ought to be made in the deportation context.[28] This Article will therefore begin to consider the extent to which it has now done so. Given its brevity, the purpose of this Article will be more to explicate tensions than to propose

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[24] *Wong Wing*, 163 U.S. at 237 (emphasis added).

[25] *Id.*

[26] *Id.*

[27] *See* Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 41, 43-45 (2005).

[28] One can see glimmers of recognition of the problem in *Harisiades v. Shaughnessy*, 342 U.S. 580, 593 (1952) (allowing retroactive application of a deportation statute). *See also* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (limiting applicability of selective prosecution defense in deportation cases); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule generally does not apply in deportation hearings).

detailed ways to resolve them. The latter task will be saved for another day. Still, generally speaking, there are three basic models: "plenary power" (*i.e.*, no constitutional rights for deportees—an untenable, inhumane, and dangerous position that hardly requires discussion); the Sixth Amendment; or Fifth Amendment due process.

The Court's choice to rely on the Sixth Amendment in *Padilla* is completely understandable (it was, after all, a criminal case) and in many respects salutary, as discussed below. However, it is also in tension with the civil/criminal distinction, and it raises complex questions about the process that might be due to deportees both in criminal courts and in immigration proceedings. Part I examines the facts and history of the *Padilla* case as it was argued before the Supreme Court. Part II examines the reasoning of Justice Stevens' majority opinion, with particular attention paid to some of its underlying tensions. Part III then considers five major unanswered questions that remain in the wake of Justice Stevens' opinion and suggests, generally, how courts might deal with various problems of applying the holding.

## I. The Facts and Issues Presented to the Supreme Court

Jose Padilla, a lawful permanent resident of the United States for over forty years, was indicted on October 31, 2001, on charges of possession of marijuana, possession of drug paraphernalia, trafficking in marijuana (an amount greater than five pounds), and operating a truck without a weight and distance tax number.[29] Apparently, he was driving a truck loaded with marijuana, along with some drug paraphernalia.[30] This latter fact became potentially relevant for reasons discussed below. After conferring with counsel, he pleaded guilty to three misdemeanor drug-related charges, and the Commonwealth of Kentucky dismissed the vehicular violation.[31] As a result of the plea he faced deportation.

Later, in post-conviction proceedings, he claimed that his criminal counsel not only failed to advise him of the deportation consequence before he entered the plea, but actually told him not to worry about deportation since he had lived in this country so long.[32] Assuming this was true, it was an absolutely astonishing lack of judgment by the lawyer, but one that, sadly, is not as rare as one might think or hope.

As a teacher of criminal law and practice along with immigration law, I have trained many criminal defense lawyers, as well as prosecutors and judges in the intricacies of immigration consequences. Technicalities aside, what I frequently used to tell them boiled down to three key points:

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[29] Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

[30] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

[31] *Id.*

[32] *Id.*

1. If you think defending the rights of criminal defendants is difficult (and it surely is), try working without a constitution for a while—that is what a lot of immigration law is;
2. If you think criminal law is complicated (and it is), you have no idea what complicated is—immigration law, though often dreadfully depressing, is fun in one way: it is full of great quotations by judges about how complicated it is. (This is a concept I once referred to as "jurisprudential *Schadenfreude*."[33]);
3. Most importantly, even though I strongly believe that criminal lawyers have an ethical obligation to advise clients about immigration consequences, *do not think you are an immigration lawyer—just watch out for certain big mistakes* (like mistakenly pleading your client into deportation, for example), and then be sure to refer your client to a good immigration lawyer. A good *pro bono* specialist might be available, but more likely your client will have to pay.

In any event, Mr. Padilla alleged that he would have gone to trial had he not received the incorrect immigration law advice.[34] This was at least plausible because his new lawyer argued that knowledge of the contents of the truck was a real issue in the case under Kentucky law.[35] Apparently, notwithstanding the paraphernalia on the seat next to him, and the admission he allegedly made to the police, Mr. Padilla could have raised such a defense. Nevertheless, the trial judge "summarily" denied his motion without an evidentiary hearing.[36] Interestingly, part of the trial court's reasoning was that Padilla's bond had been changed because he was suspected of being "an illegal alien." Therefore, opined the judge, he must have been aware of the possibility of deportation.[37] Indeed, the trial court noted that Padilla's counsel *did* discuss the deportation issue with him (albeit incorrectly). As quoted by the Supreme Court of Kentucky, the

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[33] *See* Kanstroom *supra* note 6, at 420-21 ("[U]pon first reading the Supreme Court's opinions in *INS v. St. Cyr*, *INS v. Calcano-Martinez*, and *Zadvydas v. Davis*, I could not help think[ing] . . . that I might be deprived of an odd, guilty, sort of jurisprudential *Schadenfreude* that had long pervaded my psyche and motivated my teaching and scholarship. Could it be that the apparently definitive erosion of some of the worst implications of the plenary power doctrine might make the subject less fun to teach? Will we no longer be able to cite with approval *bons mots* like, 'In an example of legislative draftsmanship that would cross the eyes of a Talmudic scholar, Section 306(c)(1) now reads . . . ' or ' . . . morsels of comprehension must be pried from mollusks of jargon.' Will we have to abandon our staple metaphors of neglected step-children and the like?").

[34] *Padilla*, 130 S. Ct. at 1478.

[35] Reply Brief of Petitioner at 25-26, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

[36] Padilla v. Commonwealth, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *3 (Ky. Ct. App. Mar. 31, 2006).

[37] *Id.* at *10.

trial court concluded that: "Padilla's counsel does not make a deportation decision and neither does this Court."[38] As we shall see, this vignette may yet be a cautionary tale even after the U.S. Supreme Court's decision.

The Kentucky Court of Appeals disagreed with the trial court and remanded the case for an evidentiary hearing on Padilla's ineffective assistance of counsel claim.[39] This was interesting because the Kentucky Supreme Court had recently made clear that so-called "collateral consequences" were outside the "scope of representation required by the Sixth Amendment."[40] Thus, a defense counsel's failure to advise a defendant of the potential immigration consequences that may flow from a plea was not "cognizable as a claim for ineffective assistance of counsel."[41] Still, the majority of the Court of Appeals panel distinguished Padilla's case from the Kentucky Supreme Court's prior holding and reasoned that "although collateral consequences do not have to be advised, 'an affirmative act of gross misadvice relating to collateral matters can justify post-conviction relief.'"[42] The Court of Appeals held that counsel's incorrect advice regarding removal could constitute ineffective assistance of counsel.[43]

One dissenter, however, believed that Padilla's statement about misadvice was "simply not credible" because "[l]ong before he entered his plea, within days after his arrest, Padilla was informed that his bond was changed from $25,000 cash to "no bond" for the stated reason that he was "believed to be an illegal alien and [was] awaiting deportation by the Federal authorities."[44]

The Kentucky Supreme Court did not feel it was important to examine Padilla's credibility or the facts of his case at all. It simply reversed the appeals court decision and eliminated any possible exception to its prior holdings about the scope of the Sixth Amendment. It recognized that many jurisdictions had held that when an attorney offers "grossly erroneous advice to a defendant which is material in inducing a guilty plea" this might constitute ineffective assistance of counsel.[45] Still, the court concluded:

> [O]ur unequivocal holding in *Fuartado* leaves Appellee without a remedy . . . . As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows

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[38] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

[39] *Id.*

[40] *Id.* at 483 (citing Fuartado v. Commonwealth, 170 S.W.3d 384 (Ky. 2005)).

[41] *Id.*

[42] *Id.* at 483-84 (quoting *Padilla*, 2006 Ky. App. LEXIS 98, at *7).

[43] *Id.*

[44] *Padilla*, 2006 Ky. App. LEXIS 98, at *10 (Henry, J., dissenting).

[45] *Padilla*, 253 S.W.3d at 484.

> that counsel's failure to advise Appellee of such collateral issue[s] or his act of advising Appellee incorrectly provides no basis for relief.[46]

Two dissenters from the Kentucky Supreme Court's opinion agreed with the basic framework as to collateral consequences. However, they thought that it was not "too much of a burden to place on our defense bar the duty to say, 'I do not know.'"[47]

Put in doctrinal terms, the Kentucky Supreme Court denied Padilla's application for post-conviction relief on the bright-line, formalistic ground that the Sixth Amendment's effective-assistance-of-counsel guarantee did not protect defendants *even from clearly erroneous* deportation advice because deportation was merely a "collateral" consequence of a conviction.

## II. Justice Stevens's Majority Opinion

Jose Padilla's Petition for a Writ of Certiorari highlighted two major questions raised by the case:

> 1. [w]hether the mandatory deportation consequences that stem from a plea to . . . an "aggravated felony" . . . is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to . . . advise; and
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> 2. . . . whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea . . . .[48]

The lawyers framed these issues very carefully in an obvious attempt to narrow the scope of what the Court had to decide. They were clever to do this, and successful. Indeed, the first question's focus on "mandatory" deportation became a centerpiece of the Supreme Court's reasoning, and to a large degree, obviated the need to consider the second question at all.

Essentially, the Supreme Court rejected the Kentucky Supreme Court's formalistic approach to the Sixth Amendment, and then five Justices went far beyond the "misadvice" issue.[49] The Court's basic holding was dramatic and portentous, if perhaps not completely consistent or comprehensive: The interpretation of the Sixth Amendment now requires that criminal defense counsel advise *at least some* noncitizens about *certain types* of

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[46] *Id.* at 485. Counsel is not required to address the matter in either instance, and, therefore, an attorney's failure to do so cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*. 466 U.S. 668, 686, 688 (1984).

[47] *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting).

[48] Petition for a Writ of Certiorari at 3, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2008 WL 4933628 at *i.

[49] *Padilla*, 130 S. Ct. at 1478, 1487. Chief Justice Roberts and Justice Alito concurred but only as to "misadvice." *Id.* at 1487, 1494 (Alito, J., concurring). Justices Scalia and Thomas dissented. *Id.* at 1494 (Scalia, J., dissenting).

immigration consequences before tendering a guilty plea.[50] As the Court put it: "[C]onstitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to *automatic* deportation."[51]

This holding was clearly of historic significance. As noted above, deportation had long been widely considered to be a mere "collateral consequence" of the criminal justice system, like losing the right to vote, eviction from public housing, or the loss of the right to possess firearms. Of course it was well-recognized as harsh, but the prevailing formalist understanding of the Sixth Amendment did not—for the most part—apply to deportation consequences, even if they were in reality much worse than the criminal consequences in a given case. For example, a fine or a suspended sentence could lead to permanent banishment of a long-term legal resident with family. The Court's decision thus moved deportation law *somewhat* from the formalist, insulated realm of the "civil" into a more functionalist discourse in which its true nature matters. But there are major gaps in the reasoning of the opinion that leave big questions.

## III. Five Features of *Padilla v. Kentucky* That Leave Profound Questions Unanswered

### A. *"Virtually Inevitable" Deportation Versus Complexity and Discretion*

The Supreme Court was clearly concerned about how far this decision might go and how it would relate to prior Sixth Amendment precedents. I believe that it is for this reason that the opinion begins with this powerful assertion:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal is now *virtually inevitable* for a vast number of noncitizens convicted of crimes.[52]

The importance of this "virtually inevitable" formulation is that it enabled the Court to build an analytic bridge between criminal prosecution and deportation. Thus, the majority concluded that:

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[50] *Id.* at 1483

[51] *Id.* at 1478 (majority opinion) (emphasis added).

[52] *Id.*(emphasis added) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

> The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is *an integral part*—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.[53]

This is a point on which a bit more thought might be warranted. First, one might ask a question of logic: does causation necessarily imply unity? I do not think so. Imagine a situation where lightning strikes the ground in a very dry forest, causing a forest fire. We might well say that this was virtually inevitable. But it does not compel the conclusion that the fire is now an "integral part" of the weather, does it?

Moreover, what should we make of the fact that many deportation consequences are not automatic or even "virtually inevitable?" Good lawyering in immigration courts can make a big difference in how certain crimes are understood, whether the government has proven its case, etc. Further, the major question in a criminal case often may be whether a particular plea will eliminate the chance to apply for what is known as "discretionary relief" from deportation. This raises two questions: why did the Court focus so strongly on this "virtually inevitable" aspect; and how far does it color the rest of the holding?

The answer to the first question cannot be that the Court was unaware of the problem. Indeed, Justice Stevens himself had written the Court's opinion in *INS v. St. Cyr* nearly a decade ago, which was all about discretionary relief.[54] As the *Padilla* Court put it:

> [W]e have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, . . . "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr* 533 U.S., at 323, . . . We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief.[55]

However, as to non-automatic, non-integral deportation consequences, the *Padilla* Court still did not enunciate an especially clear Sixth Amendment standard:

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and

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[53] *Id.* at 1480 (footnote omitted).

[54] 533 U.S. 289, 311 (2001).

[55] *Padilla*, 130 S. Ct. at 1483 (citations omitted) (quoting *St Cyr*, 533 U.S. at 323 & n.50.

> straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[56]

So it seems that, although the Sixth Amendment now *applies* to both types of consequences, its requirements vary. Why did the Court do this? One could sum it up in three small words: *fear of floodgates*, or perhaps in a few larger words: *maintenance of a vestige of doctrinal consistency*.

The "floodgates" problem is a real one, with two distinct aspects. First, there is the problem of other collateral consequences. If deportation now counts, why not voting rights, public housing, gun possession, etc.? During oral argument, Justice Scalia expressed his concern about how the Court would "decide whether we are opening a Pandora's box here, whether there is any sensible way to restrict it to—to deportation."[57] This box not only contains a welter of potential civil collateral consequences and procedural venues such as prison disciplinary proceedings,[58] but many line-drawing problems in the criminal system as well.[59] It seems that both Padilla's counsel and the Court majority concluded that the "virtually inevitable" test was the best way to limit the extension of the case.[60]

As for doctrinal consistency, the Court's model, interestingly, incorporates the same dichotomy between law and discretion that animated Justice Stevens's opinion in *St. Cyr*, albeit in the rather different context of habeas corpus.[61] As I have suggested elsewhere, this line is not so clear as it might seem at first blush.[62] Indeed, even aggravated felony cases may involve various types of interpretive discretion by the Board of Immigration Appeals to which federal courts have sometimes deferred, per *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[63] (which was also written by Justice Stevens). As a Sixth Amendment standard it is somewhat puzzling. Imagine if it applied in criminal cases. What might it mean?

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[56] *Id.*

[57] Transcript of Oral Argument at 7, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

[58] *See* Wolff v. McDonnell, 418 U.S. 539, 570, 576-77 (1974) (holding that there is no right to counsel in prison disciplinary proceedings and prison officials may open inmate mail from counsel so long as the prisoner is present).

[59] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752-54 (1991) (holding there is no right to effective assistance of counsel in a capital state post-conviction proceeding because there is no underlying right to counsel); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (citing Ross v. Moffitt, 417 U.S. 600, 617 (1974)) (holding there is no right to effective assistance of counsel in a state discretionary appeal because there is no right to counsel in the first place).

[60] *Padilla*, 130 S. Ct. at 1483.

[61] *Compare Padilla*, 130 S. Ct. at 1483, *with* INS v. St. Cyr, 533 U.S. 289, 311 (2001).

[62] *See* KANSTROOM, *supra* note 18, at 231-40; Kanstroom, *supra* note 6, at 423-28; *see also* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 165 (2006).

[63] 467 U.S. 837 (1984).

Would a defense lawyer be required to advise her client properly in the guilt phase but then only about possible mandatory sentencing, not about the more usual discretionary sentencing that judges do? In any case, the differentiation between the automatic and the discretionary is a complicated move that may have dramatic real-world costs and obvious benefits. On the other hand, the big practical question lurking behind this opinion is: how much specialized immigration law knowledge can fairly or realistically be expected from criminal defense lawyers?

### B. *The Weight of Professional Norms*

The Court in *Padilla* reiterated its two-pronged approach from *Strickland v. Washington*.[64] The first prong, which is known as *constitutional deficiency*, is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[65] The *Padilla* Court concluded that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[66] Again, this was very gratifying for those of us who have worked for years to nurture such professional norms. But note that this is a moving target of a standard, and *Padilla* itself moves it greatly. Put simply, the reasonableness norm could become a higher bar as we better train our criminal defense attorneys. During oral argument, Mr. Long, the Assistant Attorney General from Kentucky, had a long colloquy with Justice Breyer about what the prevailing professional norms were and what they should be.

Justice Breyer asked him a provocative question:

> JUSTICE BREYER: Suppose a—a client comes in. You are a criminal lawyer and you learn the facts of the case, and it turns out that, after listening to the facts, you think he is being charged with a fairly minor offense, a year maybe max, and he tells you: You know, I have a family here, I've—I've—you know, he tells you this story where it is quite apparent to you that if he pleads guilty, back he goes, where he might be killed and so might his family. Just sit there and say nothing? What would you do?[67]

They went back and forth on this (Long did not want to admit it was a professional norm). Indeed, he called it a "question of morals."[68] And then Justice Scalia weighed in with a sarcastic dose of legal realism." Well, but assuming it's a norm and that all lawyers do it, including those that know

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[64] 466 U.S. 668 (1984)

[65] *Strickland*, 466 U.S. at 688.

[66] *Padilla*, 130 S. Ct. at 1482.

[67] Transcript of Oral Argument, *supra* note 57, at 37.

[68] *Id.* at 39.

diddly [sic] about immigration law, the norm is to give bad advice. And—and here the norm was met, right?"[69]

According to the transcript, what followed was simply "[l]aughter."[70] But the fact remains that the fluidity of evolving norms will remain a live issue for many years to come.

### C. *Future Convergence*

A third big-picture question going forward is the extent to which this case signals a convergence between the norms of the criminal justice system and the deportation system. Scholars have been considering this for some time, and it is a trend with many features—some potentially positive and some rather worrisome (see for example, Arizona).[71] The *Padilla* Court said:

> Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[72]

Now there is a lot packaged in this, some of it healthy and some of it potentially pernicious. On the positive side, it does have the virtue of bringing out into the open the *post-entry social control* function of deportation (i.e., the fact that this form of deportation is not really related to border control in any significant way).[73] Because of this, more of the substantive constitutional norms of the criminal system ought to apply at least in those sorts of deportation cases—the right to appointed counsel, the exclusionary rule, double jeopardy, and the *ex post facto* clause—just to name a few. If prosecutors are now encouraged by the Supreme Court to

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[69] *Id.*

[70] *Id.*

[71] *See, e.g.*, S.B. 1070, 49th Leg. 2d Reg. Sess. (Ariz. 2010).

[72] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[73] *See* KANSTROOM, *supra* note 18, at 3-7.

bargain about deportation in the criminal process, it is a pretty complete convergence. But, on the other hand, do we really want state prosecutors to be attempting to use deportation for leverage in criminal cases? Are they trained for that? Should they be? Is it even legal, in light of the preemption concerns expressed by the Department of Justice in its challenges to the Arizona laws?[74] Further, how can defense lawyers effectively bargain about the full range of deportation consequences when they do not have the training to even anticipate them, let alone to defend against them?

### D. *How Can There Still Be No Right To Counsel in Deportation Proceedings?*

The most fundamental lurking problem is that of the deportation proceeding itself. This might be conceptualized as a Sixth Amendment problem (if deportation is sufficiently linked to the criminal process that it mandates counsel in that situation, why is the same thing not true in immigration court?). It might also be understood as a due process/equal protection problem. It now seems a rather striking irony and possibly a constitutional problem that a criminal defendant has a constitutional right to counsel who can explain and advise as to at least some possible deportation consequences, while a person arrested for being simply out of status has no such right. What if that person had consulted a housing attorney who gave bad advice and a resulting eviction proceeding had then brought her to the attention of ICE? Put most simply, the conundrum is: how can one have a constitutional right to counsel for advice about consequences that come from a process in which the same person has no constitutional right to counsel?

### E. *Counsel/Status/Territory*

This is where the deepest aspects of the new *Padilla*-inspired right to counsel jurisprudence relate to a host of underlying problems. Briefly, the main meta-question is, how does our law of the right to counsel for deportees now match up against certain variables: legal status (citizen versus noncitizen); the formal nature of the proceeding (civil versus criminal or something else); and territory (on or outside US territory)? There is much to ponder here, but for now I will just highlight some of the tensions.

One way to do this is to consider a series of cases that, ironically, involved another man named Jose Padilla.[75] He was a U.S. citizen who was

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[74] Complaint at 1, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 01413-NVW).

[75] Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 568 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

initially detained as a material witness in criminal proceedings, but not charged, and then designated an "enemy combatant."[76] This designation—an ambiguous term largely invented rather *ad hoc* by the Bush Administration—required a considerable degree of judicial analysis to determine its legitimate meaning, particularly when applied to a U.S. citizen arrested on U.S. soil.

What is often under-appreciated about this first set of *Padilla* cases is that a major question in the district court in New York was whether Padilla was entitled to appointed counsel after he was designated with this ambiguous, potentially quasi-criminal, legal status.[77] On November 13, 2001, President Bush had signed an order directing that persons whom he would determine to be "members of al Qaeda, or other persons who [had] helped or agreed to commit acts of terrorism aimed at this country, or harbored such persons, *and who are not United States citizens*," would be subject to trial before military tribunals.[78] This, of course, was the beginning of the current use of Guantánamo Bay. But the Bush Order left U.S. citizens in a kind of limbo. Consequently, Jose Padilla was arrested on May 8, 2002, in Chicago, on a material-witness warrant to enforce a subpoena to secure his testimony before a grand jury in New York.[79] On May 15, 2002, following Padilla's removal from Chicago to New York, he appeared in court, and Donna R. Newman was appointed to represent him.[80] She conferred with Padilla and, a week later, moved to vacate the warrant.[81] The government disclosed to the court ex parte that it was withdrawing the subpoena a mere two days after Padilla filed the motion to vacate.[82] The government then notified the court that the President had classified Padilla as an enemy combatant and directed Donald Rumsfeld, Secretary of Defense, to detain him, and further that the Department of Defense would take custody of Padilla immediately, transferring him to a naval brig in South Carolina.[83] Attorney Newman filed a *habeas corpus* petition but was told by the government that she would not be permitted to visit Padilla at the South Carolina facility, or to speak with him; she was told she could write to Padilla, but that he might not receive the

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[76] *Id.* at 568-69.

[77] *Id.* at 600.

[78] *Id.* at 571; *see* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 16, 2001) (emphasis added), *available at* http://frwebgate1.access.gpo.gov/cgibin/PDFgate.cgi?WAISdocID=KzJpxA/0/2/0&WAISaction=retrieve.

[79] *Padilla*, 233 F. Supp. 2d at 571 (explaining that the warrant was issued pursuant to 18 U.S.C. § 3144 (2000)).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

correspondence.[84]

After this, the government strenuously argued that Padilla had *no right to counsel*.[85] Some of the arguments were quite remarkable but the basic idea was that Padilla needed to be rendered *completely without hope* in order to be properly interrogated.[86]

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[84] Aff. of Donna R. Newman, Esq. at ¶ 8, Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/194/Padilla_Joint_Appendix.pdf.

[85] *Padilla*, 233 F. Supp. 2d at 603. The court explained:

> The government has argued that affording access to counsel would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America." This would happen, the government argues, because access to counsel would interfere with questioning, and because al Qaeda operatives are trained to use third parties as intermediaries to pass messages to fellow terrorists, even if "[t]he intermediaries may be unaware that they are being so used."

*Id*. at 603 (citations omitted).

[86] *Id.* at 603-05. As Judge Mukasey put it in a later case involving Padilla:

> [T]he Jacoby Declaration, supplemented by the Sealed Jacoby Declaration . . . . describes in broad terms the intelligence-gathering process and the importance of maintaining its continuity and integrity. However, the principal relevance of the Jacoby Declaration to the issue at hand—whether Padilla should be permitted to consult with counsel—is its description of the interrogation techniques used by the [Defense Intelligence Agency ("DIA")], and its assessment of the danger of interrupting such interrogation to permit Padilla to consult with counsel. The Jacoby Declaration describes as follows the DIA's interrogation technique:
>
> > "DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.
> >
> > Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of

Former Judge Mukasey, to his credit, disagreed. However, he focused not on Padilla's citizenship status or on the Sixth Amendment or even on due process, but on the *habeas* statute[87] which permitted appointment of counsel if "the interests of justice so require." Judge Mukasey decided that they did in this case. To be sure, Padilla's counsel had raised a Sixth Amendment claim on his behalf, but Judge Mukasey rejected that line of reasoning because he concluded that Padilla's case—after his designation—was not technically a criminal proceeding anymore.[88] Still, in apparent recognition of the uncharted nature of the waters in which he found himself, Judge Mukasey did accept that:

> [T]here would seem to be no reason why that jurisprudence cannot at least inform the exercise of discretion here. . . . Although the Sixth Amendment does not control Padilla's case,

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> work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process."

Padilla *ex rel* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 49 (S.D.N.Y. 2003) (quoting Declaration of Vice Admiral Lowell E. Jacoby at 4-5, *Padilla*, 243 F. Supp. 2d at 42 (No. 02CV04445), 2002 WL 34342502).

[87] *Padilla* 233 F. Supp. at 600. Judge Mukasey explained:

> The habeas corpus statutes do not explicitly provide a right to counsel for a petitioner in Padilla's circumstances, but 18 U.S.C. § 3006A(2)(B) permits a court to which a § 2241 petition is addressed to appoint counsel for the petitioner if the court determines that "the interests of justice so require."

*Id.* (citing 18 U.S.C. § 3006A(2)(B) (2000)).

[88] *Id.* Judge Mukasey reasoned:

> Of course, Padilla has no Sixth Amendment right to counsel in this proceeding. The Sixth Amendment grants that right to the "accused" in a "criminal proceeding"; Padilla is in the custody of the Department of Defense; there is no "criminal proceeding" in which Padilla is detained; therefore, the Sixth Amendment does not speak to Padilla's situation. Beyond the plain language of the Amendment, "even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial." Such "elements" are present here—notably, that Padilla's detention "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." Although *Escobedo v. Illinois*, . . . recognized a Sixth Amendment right against custodial interrogation without access to counsel, the remedy for violation of this right is exclusion of the fruits of the interrogation at a criminal trial. There being no criminal proceeding here, Padilla could not enforce this right now even if he had it.

*Id.* at 600 (footnote omitted) (citations omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 361-62 (1997); Middendorf v. Henry, 425 U.S. 25, 38 (1976)).

> the logic of the underlying case law suggests that discretion . . . should be exercised in favor of permitting him to consult with counsel in aid of his petition . . . .[89]

This position was conceptually, if not specifically, vindicated by the Supreme Court in *Hamdi v. Rumsfeld*, in which the Court held that a U.S. citizen captured on the battlefield had certain due process protections.[90] Justice O'Connor did not write at length on Hamdi's right to an attorney because, by the time the Court rendered its decision, Hamdi had already been granted access to one.[91] However, O'Connor did write that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand."[92] It seems clear now that a functionalist model of the due process right to counsel protects U.S. citizens in ambiguous proceedings. The implications of *Wong Wing v. United States*,[93] *Hamdan v. Rumsfeld*,[94] and *Boumediene v. Bush*,[95] support the idea that the same should be true for noncitizens, at least if they are held on U.S. soil or at Guantánamo Bay. During oral argument in *Padilla v. Kentucky*, this question of whether due process mandated counsel (or certain judicial protections) came up, at least obliquely. The opinion, however, avoids it completely, probably for the same "floodgates" reasons discussed above.[96] But nothing in the opinion focuses on the individuals' immigration status as a determining factor. So it seems that such status is now arguably irrelevant for Sixth Amendment purposes (and thus, presumably, for Fifth Amendment purposes, too).

One factor clearly still seems relevant: territory. We need to consider in detail and depth why and to what extent *pre-deportees* like Jose Padilla have a right to counsel, but under current law *post-deportees* who argue that mistakes were made in their cases (including *Padilla*-type misadvice) do not even have the right to a motion to reopen in order to raise such issues to be adjudicated. But this, too, is a task for another day.

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[89] *Id.* at 603.

[90] 542 U.S. 507, 539 (2004).

[91] *See id.* at 512.

[92] *Id.* at 539.

[93] 163 U.S. 228 (1896) (holding that noncitizens have constitutional rights when criminally prosecuted).

[94] 548 U.S. 557 (2006) (finding that the military commission convened to try the petitioner lacked the power to proceed because its structure and procedures violated the Uniform Code of Military Justice and the Geneva Conventions).

[95] 553 U.S. 723 (2008) (holding that Guantánamo Bay detainees have the constitutional privilege of habeas corpus).

[96] *See supra* Part III.A.

## CONCLUSION

*Padilla v. Kentucky*, read broadly, has many positive attributes but also has many gaps in its reasoning. Indeed, it may even have opened the door to right-to-counsel claims in deportation proceedings. If that is so, then *Matter of Compean*[97] (ironically also written by the same Michael Mukasey who had presided over alleged enemy combatant Jose Padilla's proceedings in New York) was not just a little bit wrong, but fundamentally so. However, the following excerpts from the *Padilla* oral argument might give pause if the *Compean* question ever gets to the Court:

> CHIEF JUSTICE ROBERTS: I think when we—when we decide there's no right to counsel, like on collateral review, we don't even look at what happened, right? We don't look and see whether the advice was ineffective, how bad the lawyer was. The idea is if you don't have the right at all, you don't have the right to an effective lawyer.
>
> MR. DREEBEN: That's right.
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> CHIEF JUSTICE ROBERTS: Is that right? Okay. [98]

So does *Padilla v. Kentucky* mean that deportation is/may be punishment for constitutional purposes? It is hard to say. As noted, some have called the case "our" *Gideon v. Wainwright*.[99] I would like to think this is so, but I do not—it has simply left too many questions unanswered. *Gideon*, of course, closed the circle that had been opened by the "Scotsboro Boys" case—*Powell v. Alabama*[100] and then widened by *Betts v. Brady*.[101] In those cases the Court opened the courthouse door—interestingly with

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[97] 24 I. & N. Dec. 710, 714 (Att'y Gen. 2009), *vacated* 25 I. & N. Dec. 1 (Att'y Gen. 2009) (concluding that because there was no constitutional right to counsel in deportation proceedings the Attorney General could craft a new, stricter framework for reopening cases based on claims of ineffective assistance of counsel).

[98] Transcript of Oral Argument, *supra* note 57, at 21-22. Then, Justice Roberts continues: "Well, these–when you are talking about collateral consequences, you don't have a right to counsel on–with respect to those collateral consequences. I assume there's–maybe there is–is there a right to counsel when you are facing a deportation proceeding?" *Id.* He is assured that there is not and then he asks: "Well, then, if there is no right to counsel, why do we get into whether there is an affirmative misrepresentation or not?" *Id*.

[99] 372 U.S. 335 (1963).

[100] 287 U.S. 45 (1932) (finding that failure to give "ignorant and illiterate youth" reasonable time and opportunity to secure counsel prior to trial for a crime punishable by death, while keeping them away from family and friends and closely confined under military guard violated the due process clause of the Fourteenth Amendment).

[101] 316 U.S. 455 (1942)(holding that because the Sixth Amendment right to counsel only applied to federal courts and that the Fourteenth Amendment did not incorporate that guarantee, there was no right to state-appointed counsel in every case in which a defendant, charged with a crime, was unable to obtain counsel).

qualifications very much like those in *Padilla*—to *some* claims that state courts had to incorporate Sixth Amendment norms in *certain types* of cases. The "special circumstances" doctrine—as it was then called—was so unstable that it eventually yielded to the full, bright-line version in *Gideon*; that is why most criminal defendants today have a constitutional right to counsel.

So if *Padilla* is anything analogous to the *Gideon* line, it is perhaps more like *Powell v. Alabama* or *Betts v. Brady*. Too many special circumstances and gaps remain to call it "our" *Gideon*. The task now is to reconcile this good-hearted but somewhat confused and uneasy opinion with its better conceptual underpinnings. This will require:

1. A functionalist model of the Sixth Amendment taken seriously as applied to deportation, whether as part of the criminal process or outside of it; or
2. A more expansive understanding of due process that does not require a case-by-case showing of the need for counsel in deportation cases.

The key should *not* be the "automatic" aspect of certain types of deportation but deportation's prevalence, harshness, complexity, lack of proportionality, effects on families and children, etc. Such thinking takes us a lot further than does *Padilla v. Kentucky*, but it follows logically from its underlying premises. If the courts were to follow this approach (though I fear that the opposite is more likely) then the case will be much more than Justice Stevens's last hurrah. This—like so many other interesting legal issues these days—seems to depend upon the vote of Justice Kennedy. So perhaps, as to such crucial questions as whether the case should be read to apply to past deportation cases and in the *post-deportation* context, we should look to *Boumediene* and the critical idea that questions such as these ought to "turn on objective factors and practical concerns, not formalism."[102] Stay tuned.

[102] Boumediene v. Bush, 553 U.S. 723, 764 (2008).